GANESAN PERUMAL & ANOR.

v.

CHE TOM MAN

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 12-45-1989]
29 AUGUST 1991

TORT: *Accident - Two different versions - Whether travelling in same or opposite directions - Physical evidence - More probable version - Duty of appellate Court - Contributory negligence.*

The respondent in this case was suing as a beneficiary and representative of the deceased. The deceased, died as a result of an accident involving the appellant and the deceased. Both parties were riding motorcycles. The Judge of the Sessions Court held that the defendant was wholly liable and accepted the story of PW2, an eyewitness to the accident, as being more probable than the defendant's version. PW2 alleged that both the defendant and the deceased had been travelling in the same direction, and that the accident occurred after a junction nearer to Gurun, whereas the defendant contended that the deceased was travelling in an opposite direction from him and that the accident took place on undulating land, at a point after the junction nearer to Bukit Jenun.

Held:

[1] The sketch plan bears out the story of PW2 as it shows the accident vehicles on the sidetable past the junction and nearer to Gurun.

[2] Although the defendant had been consistent in his version as to how the accident occurred, his evidence was not supported by the physical evidence.

[3] The claim by the defendant that the road was on undulating land was not borne out by the photographs, and the photographic evidence available to the Court showed that the damages to the vehicle corroborated the story of PW2 as to how the accident took place.

[4] Although the appellate Judge upheld the inferences of the Judge of the Sessions Court, it was held that the Sessions Judge erred when she said she was not left with any option of finding contributory negligence as it was not pleaded by the defence. The learned Judge was misled by the language used in para. 4 of the amended defence as it was clear that contributory negligence was pleaded.

[Findings of learned Judge upheld; appeal dismissed with costs.]

Cases referred to:

Tithes & Photo Supply Sdn. Bhd. v. Empress Lineas Maritimes Argentinas & Ors. [1977] 2 MLJ 13 ***(cons)***

Bennmax v. Austin Motor Co. Ltd. [1955] 1 All ER 326 ***(cit)***

For the Appellants - Vello; M/s. Vello & Associates
For the Respondent - Baldev Singh; M/s. Syarikat Baldev Bhar

JUDGMENT

KC Vohrah J:

In her judgment the Judge of the Sessions Court in evaluating the evidence of PW2, an eyewitness to an accident, and the evidence of the first defendant (the defendant) found the story of PW2 as regards how the accident took place as more probable than the story of the defendant. This was after she had carefully considered some infirmities in the evidence of PW2. It is obvious she did not consider the infirmities as material after she had examined the sketch plan, the photographs showing the road on which the accident had taken place and showing the two motorcycles which were involved in the accident.

PW2 had said that he was cycling from the direction of Bukit Jenun towards Padang Lembu when the motorcycle ridden by the defendant overtook him at a fast speed. It proceeded on and just after a junction on its side of the road collided with the motorcycle of the deceased which was proceeding in the same direction.

There was no other vehicle on the road then. Under cross-examination he denied there was any van approaching from the opposite direction. He also denied that the deceased's motorcycle approached from the opposite direction and was turning into the junction when the accident occurred. PW2's evidence was that the defendant's motorcycle knocked into the middle part of the motorcycle of the deceased on the offside. He also said the vehicles fell on the tarred road. The sketch plan, however, showed that the vehicles were on the sidetable and a photograph showed the deceased's motorcycle lying on its nearside on the sidetable and the motorcycle of the defendant standing on its stand on the sidetable. It is not clear if the defendant's motorcycle had previously been on the tarred road.

The defendant on the other hand said that the deceased was travelling in the opposite direction towards him; that it overtook a Land Rover and encroached into his path; he braked but he could not avoid the accident. He said that he first saw the motorcycle when it was 20 feet away when it was just overtaking the Land Rover which was then going downhill. He claimed that he was then 20 feet away from the junction. And he said that the junction (which was on his left) was on top of a hill.

If the junction was on top of a hill as claimed by the defendant then the accident must have taken place at a point after the junction nearer to Bukit Jenun (that is to the left of the junction as one faces the junction) because he claimed the Land Rover was going downhill when the deceased's motorcycle overtook the Land Rover but the evidence of PW2 was to the effect that the accident took place at a point after the junction nearer to Gurun (that is to the right of the junction as one faces it) and the sketch plan bears that out as it shows the accident vehicles on the sidetable past the junction and nearer to Gurun. There were no signs of broken glasses, scratch marks or anything else at all on the road past the junction nearer to Bukit Jenun showing that the accident had taken place to the right of the junction as one faces it. Then again if the road was going downhill towards Bukit Jenun after the junction and the accident took place on the downhill slope it seems likely that the vehicles after impact, especially the motorcycle of the deceased which the defendant claimed was travelling towards him (and therefore downhill), would have been found on the left of the junction as one faces it. And if the defendant had braked as he claimed there would have been brake marks shown going uphill but no brake marks were shown in the sketch plan. As pointed out by the learned Judge although the defendant had been "consistent in his version" as to how the accident occurred, his evidence was not supported by the physical evidence; and she also found that his explanation for failing to see the vehicles earlier was not borne out by the photographs and that it reflected poorly on his credibility.

The point is that the claim by the defendant that the road was on undulating land was not borne out by the photographs, and the photographic evidence available to the Court showed that the damage to the vehicle corroborated the story of PW2 as to how the accident took place. This is what the learned Judge stated:

> As usual, in the face of conflicting stories, the Court had to resort to the photographs and the sketch plan. The defendant's evidence that the road was on undulating land was not borne out by the photographs on p. 4 of the agreed bundle, especially photographs E and G which show the road to be quite flat. There was therefore, no reason why the defendant had only seen the Land Rover from a distance of 20 feet, if it was at all there. PW2 had in fact, said there was no other traffic on the road apart from the two motorcycles and his bicycle.
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> The sketch plan shows that both motorcycles were lying on the side table of the road with broken pieces of glass near the deceased's motorcycle. Photograph C shows that the front wheel of defendant's motorcycle was bent, whereas the damage to the deceased's motorcycle was to its centre portion especially the offside of the front basket.
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> I considered the damage to the motorcycles more consistent with the evidence of PW2. In the situation described by the defendant the damage would probably have been to the front wheels of both motorcycles. As the defendant himself had admitted, he only saw the deceased's motorcycle when it was 20 feet away and he had had no time to swerve. In that short distance it is equally unlikely that deceased had any chance to swerve either, bearing in mind that it would only take two objects moving towards each other a split second to collide in that short distance. However, the damage to the deceased's motorcycle was more to its offside rather than the front, and is more consistent with PW2's evidence than the defendants.

In my view the learned Judge was not wrong in holding that on the available evidence, on a balance of probabilities, the plaintiff had proved his case against the defendant.

Counsel for the appellant invited the Court to reverse the decision of the learned Judge relying on the Federal Court case of *Tithes & Photo Supply Sdn. Bhd. v. Empress Lineas Maritimes Argentinas & Ors.* [1977] 2 MLJ 13 where the Federal Court stated at p. 18:

> Normally, an appellate Court would not lightly differ from the finding of the trial Judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where the sole question is the proper inference to be drawn from specific facts an appellate Court is in as good a position to evaluate the evidence as the trial Judge, and should form its own independent opinion, though it will give weight to the opinion of the trial Judge. See *Bennmax v. Austin Motor Co. Ltd.* [1955] 1 All ER 326.

The Counsel argued that PW2 came from the same area as the deceased and was produced as a witness out of the blue. In short he meant that PW2 did not witness the accident. But it is obvious the learned Sessions Judge who saw and heard him accepted that PW2 witnessed the accident. PW2 had stated that after he witnessed the accident he saw the defendant leave the scene and that he went to help the deceased; he stopped a vehicle in order that the deceased could be brought to Sungei Petani General Hospital. He was not challenged on these assertions.

Counsel also argued that the Judge was wrong in saying that there was no slope in that area when the defendant claimed that there was. He argued that it was wrong for the Judge to rely on photographs to infer that there was no slope. But the defendant himself agreed that photograph E which showed the road near the junction did not show the junction was on top of a hill. In fact an inspection of all the photographs shows that the junction was not on a hill. I had earlier discussed the defendant's evidence in relation to his story about the accident occurring downhill after the junction and as I have observed, it is unlikely that

the accident would have taken place in the manner that he had described in the Court below. My view is that the learned Judge was not wrong in inferring that there was no slope and for stating that there was no reason why the defendant had only seen the Land Rover approaching from a distance of 20 feet, if it was there at all.

I have evaluated the evidence afresh and my inferences of facts on liability are no different from the learned Judge's inferences.

The learned Judge, however, erred when she said she was not left with any option of finding contributory negligence as it was not pleaded by the defence who had alleged the deceased was wholly negligent. I have looked at the amended defence re-delivered on 28 April 1988 and I think the learned Judge must have been misled by the language used in para. 4 of the amended defence; contributory negligence was pleaded.

However, on the available evidence, accepting the story of PW2 as more probable - that both the deceased and the defendant were travelling in the same direction and that the motorcycle of the defendant who was travelling fast collided with the plaintiff's motor vehicle - I can see no reason to apportion liability in this case; and the learned Judge's finding that the defendant was wholly liable for the accident stands.

The appeal is dismissed with costs.

Also found at [1991] 3 CLJ 2864